

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL WRIT PETITION NO. 1613 OF 2018

Sardar S/ Shah Wali Khan,
Age: 61 years, Occ: Prisoner,
R/o. Room No.10 Goawala Chawl
LBS road Kurla (W) Mumbai. 400070.
At present Convict No.C-6608,
Central Prison, Harsul, Aurangabad.

... PETITIONER

VERSUS

- 1) The State of Maharashtra,
Through its Principal Secretary,
Home Department,
Mantralaya, Mumbai-32.
- 2) The Inspector General of Police (Prison)
Maharashtra State,
Central Building, Pune.
- 3) The Deputy Inspector General of Police (Prison)
Central Prison, Harsul, Aurangabad.
- 4) The Superintendent of Prison,
Central Prison, Harsul,
Aurangabad.

... RESPONDENTS

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Mr. M. S. Choudhari & Mr. Mujeebuddin Chaudhari, Advocate for Petitioner.

Mr. S. J. Salgare, Advocate for Respondents.

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CORAM : **T. V. NALAWADE &
MANGESH S. PATIL, JJ.**

RESERVED ON : 03rd April, 2019.

PRONOUNCED ON : 10th April, 2019.

JUDGMENT: (Per T. V. Nalawade, J.)

. Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

2 The relief of direction to Respondents to transfer the Petitioner from closed prison to open prison is claimed in the present petition. The Petitioner is convicted in TADA case and is sentenced to suffer imprisonment for life and the decision was given on 6th June 2007. He has been behind bars in that case for more than 18 years. From the year 2010, the Petitioner started requesting the Respondent Authority to transfer him from closed prison to open prison, but till today, he is not transferred. It is the case of the Petitioner that due to his good conduct, he was released on 18 occasions on parole and furlough leave. It is his case that due to his good conduct, he was first

appointed as night watchman and then as warden. It is his case that in the past, he had approached this Court to challenge the decision of the Respondent Authority by which his request to transfer him to open prison was rejected and direction was given to Respondents to consider his request as per the provisions of law. It is contended that every time the Respondents have avoided to allow his request and the proceedings were not considered as per the provisions of law. He has also contended that he has been discriminated and similar convicts were given open prison.

3 In the reply, the Respondents have contended that as per the Maharashtra Open Prisons Rules, 1971 and particularly Rule 4(ii) (n), the Petitioner is not eligible to get open prison. It is contended by Respondents that the Inspector General of Prison has power under aforesaid Rules to decide as to whether the prisoner is eligible to get open prison. It is contended that as per the categories created by the State Government to which open prison cannot be given, the Petitioner cannot be given open prison. It is the contention of the Respondents that as the Petitioner is convicted for the offence punishable under Section 3(3) of the TADA Act and Section 120-B of

the Indian Penal Code, the Authority formed opinion that the Petitioner may prove to be danger to the security of the nation and so, his prayer is not granted and the last such application was decided on 5th November, 2018.

4 In Criminal Writ Petition No.748 of 2011 filed by Petitioner, which was decided on 31st January, 2012, this Court held that it was not possible to interfere in the decision given against the Petitioner. His application was rejected on that occasion. On that occasion, the decision was taken by the Inspector General, Prison on the basis of provision of Rule 4(ii)(n) of the aforesaid Rules. In Criminal Writ Petition No.358 of 2012, by decision dated 7th September, 2012, this Court held that Rule 4(ii)(n) of the aforesaid Rules is valid. The record and submissions show that the Resolution of the concerned Department of the State Government dated 15th March, 2010 was not considered on both the occasions by this Court.

5 Rule 4(ii)(n) and Rule 4(iii) of the Maharashtra Open Prisons Rules, 1971 are as follows:

“4. (ii) The following prisoners shall not normally be sent for confinement in an open prison: –

(n) any other prisoner or category of prisoners whom the Inspector General of Prisons considers unfit for being sent to an open prison.”

.....

“4. (iii) Notwithstanding anything contained in sub-rule (ii) the Inspector General of Prisons, may on the recommendation of the Selection Committee, consider the cases of prisoners falling under sub-rule (2) for the purpose of confinement in an open prison.”

6 If the aforesaid two sub Rules are read together, it is easy to infer that due to wording “not normally be sent”, which is used particularly in Rule 4(ii) show that there can be exceptional circumstances. Rule 4(iii) shows that in spite of the categories given in Rule 4(ii), the Inspector General of Prison has power to consider the cases covered by Rule 4(ii) and when there is recommendation of the Selection Committee, the Inspector General of Prison can transfer the prisoners of these categories also to open prison. Thus, there is no absolute bar to transfer such prisoners from closed prison to open prison. In any case, the prisoners convicted for the offence

punishable under the provisions of TADA Act are not included in Rule 4(ii), which give the category of prisoners, who are not entitled normally to open prison.

7 Resolution dated 15th March, 2010 of Home Department of the State Government shows that first time from 15th March, 2010 the TADA convicts were declared as ineligible to get open prison. However, in the same Resolution it is made clear that this Resolution was to apply only against the prisoners, who would be convicted on or after 15th March, 2010. For proper consideration and appreciation of the Resolution, it is necessary to quote the entire resolution and it is as under:

“Guidelines for premature release under the “14 Year Rule” of prisoners serving life sentence._____

GOVERNMENT OF MAHARASHTRA
Home Department,
Government Resolution No.RLP-1006/ C.R.621/PRS-3,
Mantralaya, Mumbai 400 032.
Dated 15th March, 2010.

- Read:** 1) Government Letter, Home Department,
No.RLP 1077/348/ PRS-3, dated 16th
November, 1978,
2) Government Letter, Home Department,
No.RLP 1092/13 / 252 PRS-3, dated 11th
May, 1992

- 3) Government Resolution, Home Department, No.RLP 1006/ C.R. 621/ PRS-3, dated 11th April, 2008 and 13th June, 2008.

Resolution

Government had revised guidelines for premature release of prisoners undergoing life sentences from time to time. These guidelines are applicable to the prisoners committing crimes mentioned in the Indian Penal Code. However, said guidelines does not cover grave offences such as life imprisonment under stringent laws like **TADA, MCOCA, POTA** etc. Therefore, in exercise of power vested in it under section 432 of the Criminal Procedure Code, 1973, the State Government has decided to modify the existing guidelines of even number, dated 11th April, 2008 and dated 13th June, 2008 and pleased to sanction revised guidelines. These revised guidelines are enclosed herewith as a Annexure I and Annexure II. These guidelines will applicable to the prisoners who are convicted on or after the date of issue of this Government Resolution.

2. In case of life convicts covered under these guidelines, the process of review shall commence after completion of 12 years of actual imprisonment for review under "14 Year Rule" to which provision of section 433-A of the Code of Criminal Procedure are applicable and after completion of eight years to which provisions of section 433-A of the code is not applicable. Prisoners convicted for offences against State or in terrorist activities or organised crime or similar nature of activities will not be selected for open prison.

3. If there is a difference of opinion between the Prison Advisory Board and Inspector General of Prisons, Maharashtra State, Pune, Inspector General of Prisons shall record the specific reasons in support of his recommendations.

4. The State Government reserves its rights to remit any sentence to release the prisoners only after undergoing imprisonment in excess for which there is no specific guidelines as mentioned in the annexures enclosed with this Government Resolution.

By order and in the name of the Governor of Maharashtra,

Sd/-

(S.C. Mondkar)

**Deputy Secretary to Government,
Home Department..**

To,
The Principal Secretary to the Governor of Maharashtra,
The Principal Secretary to the Chief Minister, State of Maharashtra,
The Additional Chief Secretary (Home), Home Department,
Mantralaya, Mumbai,
The Principal Secretary (A.& S.), Home Department, Mantralaya,
Mumbai,
The Secretary to the Deputy Chief Minister,
The Private Secretary to the Minister (Home),
The Private Secretary to the Minister for State (Prisons),
The Inspector General of Prison, Maharashtra State., Pune (5 copies),
All Deputy Inspector Generals of Prison,
All Superintendents of Central/District/Open Prison (2 copies),
All Desk, Home Department, Mantralaya, Mumbai.
The Government Pleader, High Court of Mumbai (Appellate Branch)/
at Nagpur and Aurangabad (5 copies)
The Select file, Desk PRS-3"

8 The aforesaid Resolution has not barred the Petitioner from getting open prison as he was convicted in the year 2007. A copy of communication of the Additional Inspector General of Prison dated 1st April, 2019 shows that to one Tuskan convicted for TADA

offence, open prison was given. In view of the aforesaid Rules and Resolution dated 15th March, 2010, it is easy to infer that there is no absolute bar to give open prison to the Petitioner. Further, considering the purpose behind the Open Prisons Rules, the decision of Inspector General of Prison, which involves the use of power given to him under Rule 4(ii)(n) needs to be used objectively viz. interest of both prisoner and society need to be considered. This aspect is not at all considered by the Selection Committee and also by the Inspector General of Prison. If the Petitioner was released on parole and furlough leave on 18 occasions during the period of imprisonment and no complaint was received from anybody about misuse of that liberty, it cannot be said that the Petitioner may prove to be danger to the society. Thus, the matter is not at all considered from objective angle by the Respondents.

9 A copy of show cause notice date 27th March, 2019 is produced to show that now action is proposed against the Petitioner in respect of use of phone by some prisoners. The Petitioner has been working as warden for many years and it is clear that only after the insistence of the prisoner and filing of the proceeding one after

other now something is probably created to show that it is not desirable to give him open prison. This alleged circumstance was not there when the matter of the Petitioner was considered by the Selection Committee and the Inspector General of Prison.

10 In the decision dated 2nd September, 2018, there is mention that the benefit of open prison cannot be given to the Petitioner as one case was pending against him. The submissions made show that no such case was pending against the Petitioner at the relevant time. This circumstance is serious one and that shows the approach of the Respondent Authority towards the Petitioner. In the present proceeding, it was admitted that as on 2nd September, 2018 there was no such case pending against the Petitioner and this ground was given by mistake. Due to this circumstance, his name was deleted from the list of eligible candidates by the Selection Committee. Due to all these circumstances, this Court holds that the decision of the Selection Committee of deleting his name was arbitrary in nature and it was against the Rules and similarly the decision of the Inspector General of Prison was not in accordance with the Rules. For all these reasons, this Court holds that the

decision of the Selection Committee and that of the Inspector General of Prison need to be set aside and the Respondents need to be made to re-consider the matter of the Petitioner. In the result, the following order is passed:

ORDER

- I. The petition is allowed.
- II. The decision of the Selection Committee holding that the Petitioner is not eligible to get open prison and the decision of the Inspector General of Prison of rejection of the application of Petitioner to transfer him to open prison are hereby quashed and set aside.
- III. The Respondents are directed to re-consider the matter of the Petitioner on the basis of previous application given as per the Rules of Prisons and aforesaid observations within 45 days from today.
- IV. Rule is made absolute in aforesaid terms.

[MANGESH S. PATIL, J.]

[T. V. NALAWADE, J.]